STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 22, 2003
v	No. 230187 Oakland Circuit Court
HEATHER FAYE ROBINSON, Defendant-Appellant.	LC No. 99-168702-FC

Before: Markey, P.J., and White and Zahra, JJ.

PER CURIAM.

Defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and sentenced as an habitual offender, third offense, MCL 769.11, to twenty to forty years' imprisonment. She appeals as of right, and we affirm.

I

Defendant first argues that the minor victim was incompetent to testify and that the trial court's decision to allow him to testify was an abuse of discretion. The determination of a witness' competency is within the discretion of the trial court, and the decision will be reversed on appeal only for an abuse of discretion. *People v Breck*, 230 Mich App 450, 457; 584 NW2d 602 (1998). Because defendant did not preserve this issue with an appropriate objection at trial, we review the issue for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

MRE 601 states the general rule with respect to witness competency:

> Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in the rules.

The court rule presumes that witnesses are competent to testify. *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). It "does not focus on whether a witness is able to tell right from wrong but, rather, on whether a witness has the capacity and sense of obligation to testify truthfully and understandably." *Breck, supra*. In *People v Cobb*, 108 Mich App 573, 575; 310 NW2d 798 (1981), the trial court examined the kindergarten-aged witness and determined that he

was competent to testify even though he was reluctant to answer some questions. Because the trial court listened to the witness' answers and ascertained, to its own satisfaction, that the child would tell the truth, the requirements of MRE 601 were met. *Id.* at 575-576.

In this case, the trial court examined the victim, who was six-years-old at the time of trial. The victim expressed that he knew the difference between the truth and a lie and that he understood that he needed to tell the truth, which he promised to do. He answered the trial court's foundational questions in a truthful and understandable manner. The trial court ascertained that the victim was competent to testify. We find no abuse of discretion. Further, we note that any subsequent showing of a child's inability to testify truthfully or of a child's inconsistencies in testimony reflect on the credibility of the child's testimony, not the child's competency. *People v Coddington,* 188 Mich App 584, 597; 470 NW2d 478 (1991); *People v Jones,* 142 Mich App 207, 210; 369 NW2d 212 (1985).

Defendant also challenges the victim's competency on the basis of lack of personal knowledge. The victim purported to testify from personal knowledge. Defendant asserts that the court, nevertheless, was obliged to conduct a pretrial "taint" hearing to determine whether the victim in fact had personal knowledge or was testifying based on beliefs instilled by improper and suggestive investigative techniques. We first observe that defendant requested no such hearing, and first raised the issue in a motion for new trial and *Ginther*[1] hearing. Thus, the issue of trial court error is unpreserved. It its opinion denying a new trial, the trial court correctly observed that defendant failed to present any Michigan law supporting his claim that a hearing should have been held, or that counsel was ineffective for failing to request such a hearing. *People v Meeboer*, 439 Mich 310; 484 NW2d 621 (1992), cited by defendant, deals with the reliability of statements made by the child victim to third parties, not with a child victim's in-court testimony. We find no plain error in the court's failure to conduct a "taint" hearing and no ineffective assistance of counsel based on counsel's failure to address the taint issue by seeking a pre-trial hearing. Counsel addressed the issue through cross-examination and through expert testimony. Further, it seems likely that had the court conducted such a hearing, the court would have determined that under the circumstances presented here, the victim's credibility was a question for the jury.

II

Defendant next argues that the trial court made improper rulings with respect to hearsay testimony.

Defendant first contends that the testimony of Walter Peterman should not have been admitted as an exception to the hearsay rule. We disagree. MRE 803A provides an exception to the hearsay rule for statements describing sexual acts performed with, or on, the declarant by the defendant. MRE 803A is applicable where the declarant is under the age of ten at the time of the statement, where the statement is shown to be spontaneous and without manufacture, where the statement was made immediately after the incident or where delay is excusable because of fear,

[1] *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973).

and where the statement is introduced through the testimony of someone other than the declarant. MRE 803A further provides that if the declarant made more than one corroborative statement about the incident, only the first statement is admissible under this rule.

Defendant challenges the admission of Walter Peterman's (the victim's step-grandfather) testimony regarding the victim's statements to him describing the victim's sexual activities with defendant. Defendant's objection below was addressed to whether the March 7, 1999 statement to Peterman was the victim's first statement. On appeal, defendant makes a general objection that the totality of the circumstances surrounding the statement were not sufficiently developed and that the story was told over one year after the event. We reject these arguments. A sufficient foundation was laid to support the introduction of the statement under MRE 803A. Further, there was adequate explanation for the delay in reporting the sexual activity.

Defendant also challenges certain testimony by Sandra Peterman with respect to an incident that occurred after the victim spoke to defendant by telephone. Defendant asserts that the testimony in question constituted inadmissible hearsay. However, the challenged statements were not hearsay under MRE 801(c), because the witness' personal observations of the victim's conduct and statements about "going on a date" were not offered to prove the truth of the matter asserted, i.e., that the victim was going on a date.

III

Defendant next argues that the trial court improperly precluded her expert, Karol Ross, from testifying about the notes and conclusions of the victim's therapist, Lou Goldman. At trial, defendant's counsel asked Ross to "comment" on or testify about Goldman's notes and conclusions. The prosecutor objected on hearsay grounds. The trial court sustained the objections. The trial court's decision to exclude evidence is reviewed for an abuse of discretion. *People v Newton (After Remand)*, 179 Mich App 484, 494; 446 NW2d 487 (1989).

We find no abuse of discretion. While it is undisputed that an expert may rely on hearsay testimony in formulating an opinion, MRE 703; *People v Dobben*, 440 Mich 679, 695; 488 NW2d 726 (1992), the trial court did not prohibit Ross from relying on Goldman's notes and conclusions. It simply sustained objections to certain questions that were directed at the substance of Goldman's and the Care House interviewer's findings. The questions regarding Goldman focused on eliciting testimony regarding "magical thinking," apparently in an effort to undermine the victim's credibility. The Care House questions focused on the conclusion that the victim was incompetent to testify. While MRE 703 permits an expert to rely on hearsay, it also permits the court to require that the underlying facts or data essential to an opinion or inference be in evidence. Here, where defendant intended to provide the jury with the information that Goldman found magical thinking and Care House concluded the victim was not competent, and then use that information as the basis for a conclusion that the victim was not reliable, the trial court did not abuse its discretion in sustaining the hearsay objection, in effect ruling that Goldman and the Care House examiner would have to explain their conclusions before Ross could comment on them. In contrast, Ross was not prohibited from commenting on other aspects of Goldman's notes, and on proper interviewing techniques for children and how children can be influenced by the interviewer. Because Ross was not prohibited from relying on or utilizing Goldman's notes in formulating her expert opinion and because she was not prohibited from

rendering conclusions with respect to the case, we are not persuaded that defendant was prevented from presenting her defense because of the rulings at issue.

We also conclude that counsel was not constitutionally ineffective in his handling of Ross's testimony. While counsel may have made a greater effort to rephrase his questions so as to avoid an account of Goldman's notes and focus on Ross's criticisms and how Goldman might have affected the victim's memory of the alleged events, counsel was successful in presenting the core of Ross's testimony, and we are satisfied that a more complete discussion of the issues would not have affected the outcome of the trial.

IV

Defendant next argues that the trial court lost control of the evidence. Defendant complains of eleven separate instances in which she believes the trial court should have sua sponte interfered in the proceedings after defense counsel failed to object. The statements attributable to the victim were not objectionable for the reasons discussed above. Defendant characterizes some of the evidence as other bad acts evidence. Assuming this evidence was irrelevant or inadmissible, it was not so blatantly so as to require that the court intervene sua sponte. Further, with respect to the eleven statements, defendant merely cites the applicable rule of evidence, but does not discuss, explain, or rationalize her positions. A defendant may not leave it to this Court to discover and rationalize the basis for her claims. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). We will not explore the context of each challenged statement, analyze the testimony in light of the alleged evidentiary errors, and rationalize why the trial court should have interfered to preclude the testimony. See also *People v Conner*, 209 Mich App 419, 430; 531 NW2d 734 (1995) (this Court declines to consider issues that are given cursory treatment).

V

Defendant next argues that she was denied the effective assistance of counsel. In order to establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive her of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

In addition to merely listing thirty-five instances of misconduct, defendant separately alleges several other instances of inadequate representation. Many of the allegations have already been addressed. We specifically note that defendant challenges counsel's decisions with respect to witnesses and evidence. Defense counsel testified at the *Ginther* hearing that he determined that the witnesses urged by defendant would not be particularly helpful or persuasive. Defense counsel's decisions with respect to the witnesses who were called and the evidence that was presented were matters of trial strategy, which this Court will not second-guess. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Defendant also complains that trial counsel should have objected to, or moved to suppress, evidence of "improper 'biting,' 'bruising,' 'bashing,' and 'abusing' testimony," which was elicited through Walter and Sandra Peterman. The general admission of defendant's other acts was part of defense counsel's trial strategy. He wanted the evidence of defendant's past, bad acts admitted into evidence. At the *Ginther* hearing, defense counsel testified that he wanted defendant's life to be broadly explored and put into perspective. He was prepared to object to anything he did not want admitted. In closing argument, defense counsel used the bad-acts evidence to portray defendant as being honest about her past and mistakes. He also used the evidence to paint a portrait of the relationship between defendant and her mother. This enabled defense counsel to argue that the driving force behind the allegations in this case was Sandra Peterman's judgment of defendant's interactions with the victim. Under the circumstances, defendant has failed to overcome the presumption that the challenged conduct was sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

Next, we disagree that defense counsel was ineffective with respect to expert witnesses. At the *Ginther* hearing, counsel explained why he chose not to call Catherine Okla. Counsel's decision not to call Okla was a matter of trial strategy. *Davis, supra.* Defendant has not demonstrated that this decision warrants reversal. *Stanaway, supra.* Moreover, while defense counsel did not elicit all of the testimony he wanted to elicit from Ross, she provided the jury with data and information about the manner in which children can be manipulated. She also rendered an ultimate conclusion in this case. Defense counsel testified at the *Ginther* hearing that he was able to use Ross' testimony effectively to argue the case to the jury. He believed that this argument, coupled with discrepancies in other testimony and the evidence of the dynamics between the parties, was sufficient to raise an issue of doubt with the jurors. He consciously decided not to call Goldman to fill in any of the gaps with respect to Ross' testimony. We will not second-guess counsel's decision with respect to the evidence. *Davis, supra.*

Finally, we conclude that defendant has not sustained her burden with respect to her claim that counsel was ineffective in not calling Mark Fecteau to testify regarding the appearance of defendant's pubic area during the time in question. Defendant asserts that Fecteau would have testified that defendant was a former exotic dancer and had gotten into the habit of shaving her pubic area, and also had a pierced labia in which she wore a small hoop earring. Defendant argues that this testimony would have cast serious doubt on whether the victim, in fact, experienced the sexual interactions with defendant, because the victim asserted that defendant's pubic area was hairy, and failed to mention any earring. Counsel decided not to call Fecteau based on the hostility between Fecteau and defendant. We will not second-guess this decision.

VI

Defendant next argues that the prosecutor committed misconduct in eliciting lurid testimony and in making lurid remarks. This issue was not preserved with an appropriate objection at trial and, therefore, we review the issue for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). We find no plain error requiring reversal. The challenged testimony was relevant. It served to establish the elements of the crime and to rebut that the victim fabricated the sexual contact with defendant. The terminology employed was not prejudicial. MRE 403. It is not misconduct to elicit admissible testimony. See *People v Curry*,

175 Mich App 33, 44; 437 NW2d 310 (1989); *People v Thompson*, 111 Mich App 324, 333; 314 NW2d 606 (1981).

Defendant also argues that the prosecutor engaged in misconduct when he misspoke and referred to defendant's "little penis" on three occasions. A prosecutor may not argue facts that are not in evidence. *Watson, supra* at 588. The prosecutor in this case argued, or referred to, a fact that was not evidence. Obviously the female defendant did not have a penis or a little penis. The misstatements, however, were not intentional. A timely objection could have resulted in a curative instruction, which would have cured any prejudice. Moreover, the jury was instructed that the lawyers' statements, arguments and questions were not evidence. Therefore, there is no error requiring reversal. *Id.* at 586.

VII

Finally, defendant argues that her twenty year, minimum sentence violates the principle of proportionality. We review defendant's sentence for an abuse of discretion. *People v Crawford*, 232 Mich App 608, 621; 591 NW2d 669 (1998). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). The principle of proportionality applies when reviewing habitual offender sentences. *People v McFall*, 224 Mich App 403, 415; 569 NW2d 828 (1997).

We find the sentence in this case to be proportionate to the offense and the offender. Defendant had a lengthy criminal record and the offense was serious. Although defendant was an habitual offender, the court nevertheless imposed a sentence within the guidelines.

Affirmed.

/s/ Jane E. Markey
/s/ Helene N. White
/s/ Brian K. Zahra